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REGULATION AND SMALL BUSINESS
THE IMPORTANCE OF A TRANSPARENT PROCESS

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I want to start by thanking the conference organizers for inviting me to be a part of this program. This is my first visit to China. And, like my experience advocating on behalf of small businesses in the United States, it is one thing to study entrepreneurship or how a country like China is meeting the challenges of cultivating small firm growth, but it is even better to visit small businesses or to visit China to learn first-hand what is going on.

I believe the United States and China can learn from each other by maintaining an open dialogue on issues of importance. Today, my talk will cover one part of creating an environment where small and medium sized enterprises can flourish. That is building greater transparency into the regulatory process.

Over the past six years in my position as Chief Counsel for Advocacy, I have traveled to Ireland, Sweden, Canada, and the United Kingdom to meet with officials and discuss how their countries' regulatory systems recognize the uniqueness of small business and are structured to carefully consider the impact on small firms prior to finalizing government mandates. Additionally, I regularly host foreign leaders to cover these same topics. The sharing of best practices and the exchange of ideas is more relevant than ever before in our increasingly interdependent global economy.

I would first like to explain my position in the United States government. Then, I will discuss the importance of transparency in the development of regulatory policy. I will cover the impact of regulation on small business, and lastly, I will share examples of how government can minimize its impact on the small business community while still meeting important regulatory goals.

I. The Office of Advocacy at the United States Small Business Administration

I was nominated by President Bush and confirmed by the United States Senate in 2002 to assume the duties of Chief Counsel for Advocacy. Prior to my appointment, I served as an attorney with the United States Environmental Protection Agency and the United States Department of Justice. More recently, I worked for the National Federation of Independent Business, which represents over 300,000 small independently owned businesses. My current position, as a senior member of the President's management team, is designed to analyze and reduce our government's impacts on small business. I have tremendous independence in presenting a small business perspective directly to the

President, to Congress, to regulatory agencies, and to leaders in the individual American states. In presenting the views of small business on issues such as environmental regulation, taxes, health care, food safety, and border security, I am clear that my positions do not necessarily reflect the official position of the United States. That independence gives me enormous power to bring about positive change on behalf of small business. But, as you can imagine, this power must be exercised with diplomacy. I hope that my unique authority becomes clearer as I explain the legal system in which we operate.

II. United States Regulatory System

The United States administrative rulemaking system is shaped by three laws and two Executive Orders. The laws are the Administrative Procedure Act, passed in 1946, the Regulatory Flexibility Act, passed in 1980, and the Small Business Regulatory Enforcement Fairness Act, passed in 1996. The Administrative Procedure Act guarantees that the public has legitimate input in the rulemaking process. The Regulatory Flexibility Act, amended by the Small Business Regulatory Enforcement Fairness Act, further guarantees small business input in rulemaking. Not only do these laws lay out how public input must shape regulatory decisions, they do it through a transparent process. Executive Orders 12866 (signed by President Clinton in 1993) and 13272 (signed by President Bush in 2002) further require that rulemakings be supported by cost-benefit, scientific, and economic analysis. Executive Order 12866 (Regulatory Planning and Review) requires agencies to submit proposed and final rules along with their regulatory impact analyses to the Office of Management and Budget (the White House office in charge of central regulatory oversight) for review and interagency coordination before they are published in

the Federal Register. This is done both at the proposed stage and again at the final stage of rulemaking. The Office of Advocacy works closely with the Office of Management and Budget, the rulemaking agency, and other parts of government to improve the Regulatory Impact Analyses and the rules.

These laws and executive orders, coupled with electronic access to rulemaking information, are driving the regulatory decision process out into the open. And small business benefits as a result. Without these laws and executive orders, government decisions were made behind closed doors and small business was at a severe disadvantage. Not only were small businesses unable to have their concerns heard in Congress, the courts, and in the regulatory agencies, but the rules and regulations were hitting them the hardest. A 2005 study funded by my office, *The Impact of Regulatory Costs on Small Firms* shows that small businesses with less than 20 employees spend \$7,647 each year per employee just to comply with federal regulations and mandates. This cost, which is more per-household than the cost of health insurance, is 45 percent higher per employee than what large firms with 500 or more employees spend. Over the past decade, small firms have created 60-80 percent of the net new jobs in the United States economy. These numbers clearly show that while small business is the economic engine of the United States, they are hardest hit by regulations. That illustrates why small business should have guaranteed input in regulatory decision-making.

III. Guaranteed Small Business Involvement in the Regulatory Process

The Regulatory Flexibility Act requires that government agencies conduct a small business impact analysis in conjunction with proposing a new rule. Part of that analysis is a consideration of less burdensome alternatives that can achieve the purpose of the regulation while minimizing the regulatory burden on small firms. My office acts to monitor government agencies in their practice of developing impact analyses. Many times we work to connect individual or groups of small businesses with the regulatory agencies. We also provide agencies with data, information, and methodology to conduct impact analysis, as well as add constructive input to their process.

A good example of how individual small businesses can assist government in tailoring regulations to lessen economic burdens is my experience with a regulation drafted by the United States Environmental Protection Agency to reduce pollution from diesel tractors. The Agency originally required all new tractor engines to include bulky pollution control equipment. My office, based on input from small business, advised that the tractor engine cover would not fit over the newly required equipment. Thanks to the small business input, the United States Environmental Protection Agency changed their method and, instead, phased in the technology requirements for the installation of pollution controls by small manufacturers. A phase-in allows:

- a) for problems, glitches, and bugs to lessen as technology develops;
- b) for the device to become more streamlined and smaller as technology matures; and
- c) for the price of the technology to drop as it becomes an industry standard.

As a result of the collaboration between small businesses and the Environmental Protection Agency, small engine manufacturers are saving \$1.38 billion annually and the agency will achieve significant emission reductions, yielding \$78 billion in health benefits. This same collaborative model exists, facilitated by my office, with over 30 government agencies ranging from the Internal Revenue Service (tax collection) to the Department of Homeland Security.

The ability to sensitize agencies to their impact on small business was strengthened by 1996 amendments to the Regulatory Flexibility Act. Those amendments were titled, the Small Business Regulatory Enforcement Fairness Act. Additionally, President Bush's Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking (2002)) prioritized agency attention to the impact on small business and required my office to train agencies in how to properly analyze small business impact. Recently, the President amended Executive Order 12866 (mentioned earlier) to reinforce his support for the Regulatory Impact Analyses process.

The 1996 amendments to the Regulatory Flexibility Act required the Environmental Protection Agency and the Occupational Safety and Health Administration to convene special panels of small businesses that provide detailed input on individual new administrative regulatory proposals. The amendments also created an Ombudsman at the Small Business Administration who hears complaints about unfair enforcement by agencies against small businesses, and the amendments allow the small business impact analysis to be judicially reviewable (a small business can take an agency to court if the agency has not adequately considered the impact of a new regulation on small business).

IV. Stakeholder Input and Transparency in Regulatory System

“Transparency” can mean many things. What I mean by “transparency” is that analysis of a regulation’s impact, shared publicly, will drive stakeholders (including small business interests) to try and improve the analysis and improve the regulation prior to government making a final decision. And, “transparency” also means that the final decision, released to the public, includes a discussion of the analysis, response to comments, and changes made to the regulation because of stakeholder involvement.

A good example of an agency’s openness in crafting a regulation was my experience with the United States Occupational Health and Safety Administration when they took steps to protect workers from dangerous fumes on an assembly line where workers applied chemical coating to metal products. The agency was considering a venting system that would blow air between the assembly line and the workers. Thanks to small business input, the agency discovered that the venting method would put them in violation of environmental laws. The agency recently re-drafted their proposal and finalized a standard that protects workers and minimizes the burden on small businesses (and does not force small businesses them to violate other laws...).

Several countries are experts in transparency in government regulatory decision making. My experience with Nordic countries, like Sweden, is that they carefully examine paperwork burden associated with new regulatory mandates and try and minimize that burden. The United Kingdom requires that new regulations contain small business impact

statements and they have recently announced government-wide regulatory reform measures. And, the European Commission is exploring ways to rely more heavily on a cost-benefit approach toward regulation.

The function of my office is unique; to independently act as a check or balance to regulatory action proposed by other parts of the government. The Office of Advocacy's unique mission grew from a realization in the United States that small business needs special attention and heightened representation. That is the role of my office.

Whether it is through an office like mine, or an aggressive outreach mechanism by a central government office, engagement with the small business community is key to stakeholder involvement in the development of regulation. Many times, my role is to simply connect small businesses or organizations that represent small businesses with government agencies and let them resolve conflicts together. Other times, my role is to act on behalf of large portions of the small business community to represent their interests in the development of new rules and regulations. Either way, that connection (between the government agency and small business interests) is critical.

Electronic access to information has added new meaning to "transparency" and "stakeholder involvement." That access has spurred greater activism through analysis and information by non-government sources. Organizations like The Heritage Foundation, the Mercatus Center at George Mason University, and the Ewing Marion Kauffman Foundation, and universities like Harvard and Carnegie Mellon, and employer advocacy groups like the National Federation of Independent Business, the U.S. Chamber of

Commerce, and the Small Business & Entrepreneurship Council all have economists who are able to analyze and inform regulatory decisions. That analysis, data, and cost-benefit information, in the public domain, may be critiqued, peer-reviewed, legitimized, and ultimately used by regulatory agencies. The open exchange of information leads to better regulatory decisions.

V. Conclusion

Discussions of transparency and administrative process can overwhelm academics, lawyers, policy officials, and government leaders because of the enormity of issues such as reliance on data, harmonization with trade partners, cost-benefit analysis, and governmental structures. This set of issues can be less daunting if one learns from the experiences of other countries. I believe that a transparent administrative process is prompted by a two-part realization. First, is the knowledge of how important small and medium-sized enterprises are for the country (both economically and socially). Second, is the corollary that government must be extra sensitive to how it impacts small business. With these understandings comes the necessity of data-driven decisions and an open dialogue between small business and government. I continue to learn from my colleagues all over the world. I learn from their success and I hope they learn from ours. I will travel back to the United States armed with a greater knowledge of how we can get it right and I am committed to continuing to share information with you, with officials in Beijing, and with small business owners who are likely already two or three steps ahead of us all.